

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: SB 226

SPONSOR: Senator Posey

SUBJECT: Law Enforcement Fair Defense Act

DATE: January 28, 2004 REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Cellon</u>	<u>Cannon</u>	<u>CJ</u>	<u>Favorable</u>
2.	<u>                    </u>	<u>                    </u>	<u>JU</u>	<u>                    </u>
3.	<u>                    </u>	<u>                    </u>	<u>CP</u>	<u>                    </u>
4.	<u>                    </u>	<u>                    </u>	<u>ACJ</u>	<u>                    </u>
5.	<u>                    </u>	<u>                    </u>	<u>AP</u>	<u>                    </u>
6.	<u>                    </u>	<u>                    </u>	<u>                    </u>	<u>                    </u>

## I. Summary:

The bill creates the “Law Enforcement Fair Defense Act” by revising existing law governing the provision and payment of a law enforcement officer’s legal representation in civil and criminal actions under specified circumstances. Specifically, the bill provides as follows:

- Broadens the definition of officer to include law enforcement officer, corrections officer, and correctional probation officer for purposes of who may qualify for the provision and payment of legal representation associated with his or her defense in a civil or criminal action.
- Mandates an employing agency to provide and pay for legal representation in criminal actions against an officer if all of the following criteria are met:
  - (a) The officer’s action occurred in response to an emergency; upon the need to protect the officer or others from imminent death or bodily harm; or during an officer’s fresh pursuit, apprehension, or attempted apprehension of a suspect whom the officer reasonably believes has perpetrated or attempted to perpetrate a forcible felony or escape;
  - (b) The officer’s actions arose within the course and scope of his or her duties; and
  - (c) The officer’s actions were not acts of omission or commission which constituted a material departure from the employing written policies and procedures, or from generally recognized criminal justice standards if no written policies or procedures exist.
- Provides an alternative process by which an employing agency may reimburse an officer’s legal representation when an employing agency does not provide an attorney or the officer does not use the employing agency’s attorney, but only if the officer did not plead guilty or nolo contendere or was not found guilty at trial.
- Caps reimbursement for fees and costs under the alternative process at \$100,000.

This bill amends section 111.065 of the Florida Statutes.

## II. Present Situation:

Under current law, an employing agency of a law enforcement officer is authorized, but not obligated, to pay the legal costs and reasonable attorney's fees for any law enforcement officer's defense in any civil action under specified circumstances.<sup>1</sup> An action must have arisen out of the performance of the officer's official duties and: (a) the plaintiff requests dismissal of the suit, or (b) the law enforcement officer is found to be not liable or not guilty in order for the agency to cover the costs of a legal defense.<sup>2</sup>

A law enforcement officer is defined as "any person employed full time by any municipality or the state or any political subdivision thereof or any deputy sheriff whose primary responsibility is the prevention and detection of crime or the enforcement of the penal, traffic, or highway laws of this state."<sup>3</sup> In ch. 943, F.S., governing the Department of Law Enforcement, the definition is more explicit wherein the law enforcement officer is defined as:

...any person who is elected, appointed, or employed full time by any municipality or the state or any political subdivision thereof; who is vested with authority to bear arms and make arrests; and whose primary responsibility is the prevention and detection of crime or the enforcement of the penal, criminal, traffic, or highway laws of the state. This definition includes all certified supervisory and command personnel whose duties include, in whole or in part, the supervision, training, guidance, and management responsibilities of full-time law enforcement officers, part-time law enforcement officers, or auxiliary law enforcement officers but does not include support personnel employed by the employing agency.<sup>4</sup>

### Civil Actions Against Law Enforcement Officers

Currently, any agency of the State, or any county, municipality, or political subdivision is authorized to:

Provide an attorney to defend any civil action arising from a complaint for damages or injury suffered as a result of any act or omission of action of any of its officers, employees, or agents for an act or omission arising out of and in the scope of his or her employment or function, unless, in the case of a tort action, the officer, employee, or agent acted in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety or property.<sup>5</sup>

However, the state, a municipality, a county, or other political subdivision, may recover any attorney's fees paid from public funds from the law enforcement officer, provided the employee

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<sup>1</sup> Section 111.07, F.S. (2002).

<sup>2</sup> Section 111.07, F.S. (2002).

<sup>3</sup> Section 111.065(1), F.S. (2002).

<sup>4</sup> Section 943.10(14), F.S., defines an "officer" as "any person employed or appointed as a full-time, part-time, or auxiliary law enforcement officer, correctional officer, or correctional probation officer." Unlike the definition in s. 111.065(1), F.S., the s. 943.10(14), F.S., definition includes correctional officers and correctional probation officers.

<sup>5</sup> Section 111.07, F.S. (2002).

is found to be personally liable by virtue of having acted outside the scope of his or her employment, or having acted in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard for human rights, safety, or property.<sup>6</sup>

State agencies have access to a self-insurance fund for the payment of defense counsel for certain civil actions, including defense counsel from the Office of the Attorney General's Civil Division or from a private law firm with whom the State of Florida has a contract. Should the civil action fall outside of those areas covered by the trust fund, the agency, if it chooses, may cover the cost of the law enforcement officer's legal defense out of its own funds. In practice, most law enforcement agencies provide legal representation for a civil action against a law enforcement officer until a conflict of interest arises. At that point, the agency may hire separate legal counsel for the officer.

The State operated self-insurance fund provides coverage for claims arising out of worker's compensation, general liability, fleet automotive liability, federal civil rights actions under 42 U.S.C. s. 1983 or similar federal statutes, and also court-awarded attorney's fees in other proceedings, except for such awards in eminent domain and inverse condemnation actions or awards by the Public Employees Relations Commission.<sup>7</sup> This self-insurance fund is called the "State Risk Management Trust Fund" and is administered by the Department of Financial Services as part of the risk management program. Claims covered by the trust fund must be immediately reported to the department for handling. The department assigns counsel or reassigns counsel as necessary and receives reports regularly on the status of the litigation.<sup>8</sup>

In the majority of cases brought against a law enforcement officer for actions taken while the officer is on duty, the employing agency and the law enforcement officer are named in the action. In practice, most law enforcement agencies opt to provide legal representation for the defense of the law enforcement officer's civil or criminal action until a conflict of interest arises. At that point, the agency may hire separate legal counsel for the law enforcement officer. Usually, the cost of the defense is covered by insurance or self-insurance. Some law enforcement agencies expressly provide for such legal defense within their law enforcement union contract.<sup>9</sup>

### **Course and Scope of Employment**

In third-party liability actions, an entity may be liable for the negligent acts of its employees. However, the entity is only liable for the negligent acts of its employees if those acts occurred within the course and scope of the employee's duties. In addition, the act must not have been taken in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. The Legislature has expressly waived sovereign immunity in tort actions for claims against its agencies and subdivisions, resulting from the

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<sup>6</sup> Section 111.07, F.S. (2002).

<sup>7</sup> Section 284.31, F.S. (2002).

<sup>8</sup> Section 284.385, F.S. (2002).

<sup>9</sup> For example, the City of Atlantic Beach, in its contract with the police union, agrees "to provide at no cost to the employee, the services of an attorney to defend the employee against any civil actions brought against him while acting as an agent of the City, in the line of duty and on the city's behalf, unless such action is brought about by an act of the employee due to his own violation of Department Rules, Policies, Procedures or Instructions, negligence, carelessness or the employee acted in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard for human rights, safety, or property."

negligent or wrongful act or omission of an employee acting within the scope of employment, but established limits on the amount of liability.<sup>10</sup> A claim or judgment by any one person may not exceed \$100,000, and may not exceed \$200,000 paid by the state or its agencies or subdivisions for claims arising out of the same incident or occurrence.<sup>11</sup>

In *Sussman v. Florida East Coast Properties, Inc.*,<sup>12</sup> a fitness instructor at a health spa owned by Florida East Coast Properties, Inc., received a telephone call from her boss asking her to pick up a birthday cake on her way to work. En route to work after picking up the cake, the employee was distracted as she attempted to stop the cake from falling off the seat. Her car left the road and struck Mr. Sussman as he sat on a bench waiting for the bus. The court held, as a matter of law, the employee was not acting within her course and scope of employment. In reaching this conclusion, the court relied on a three-prong test. An employee's actions are within the course and scope of employment, for purposes of determining the employer's vicarious liability to third persons injured by the employee, only if:

- (a) the conduct is of the kind the employee is hired to perform;
- (b) the conduct occurs substantially within the time and space limits authorized or required by the work to be performed; and
- (c) the conduct is activated at least in part by a purpose to serve the master.<sup>13</sup>

In *Craft v. John Sirounis and Sons, Inc.*,<sup>14</sup> this test was applied to the fact situation of an off-duty police officer who had been drinking and got into a bar room brawl with four off-duty police officers. None of the officers were in uniform, carrying a gun, or wearing a badge. Craft was injured in the fight and sued the cities of Fort Lauderdale and Deerfield Beach, the employers of the police officers. Each of the police officers asserted that they were on duty 24 hours a day. The Fourth District Court of Appeal applied the *Sussman* test to conclude that the conduct of the officers was not within the scope of their employment "nor was their action in the interest of the cities."<sup>15</sup>

### **Fresh Pursuit**

Many civil cases against police departments and law enforcement officers have arisen due to injuries to third persons caused by high-speed chases by law enforcement officers in "fresh pursuit" of a suspect of crime. Early court cases implicitly recognized a fundamental social cost-benefit analysis regarding immunity from liability for a law enforcement officer's decision to pursue despite the inherent risk of harm to innocent persons.<sup>16</sup> However, over the years the actions of law enforcement officers during high-speed pursuits, including what functions are discretionary or operational and whether the social benefits outweigh the inherent risks, have come under increased judicial and public scrutiny. Partly in response to this scrutiny, many law enforcement agencies have adopted high-speed pursuit policies.

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<sup>10</sup> Section 768.28(1), F.S. (2002).

<sup>11</sup> Section 768.28(5), F.S. (2002).

<sup>12</sup> 557 So. 2d 74 (Fla. 3d DCA 1990).

<sup>13</sup> *See id.* at 76, *citing*, Kane Furniture Corp. v. Miranda, 506 So. 2d 1061 (Fla. 2d DCA 1987). *See also* Whetzel v. Metropolitan Life Ins. Co., 266 So. 2d 89 (Fla. 4th DCA 1972).

<sup>14</sup> 575 So. 2d 795 (Fla. 4th DCA 1991).

<sup>15</sup> *See id.* at 11.

<sup>16</sup> *See* City of Miami v. Horne, 198 So. 2d 10 (1967).

In *City of Pinellas Park v. Brown*,<sup>17</sup> the Florida Supreme Court placed a duty of care on the police in a comparable high-speed pursuit scenario even though the accident did not directly involve a police vehicle. The court reasoned that a substantial portion of the risk of injury to a foreseeable victim was being created by the police themselves. The court held that the duty would have existed regardless of whether a specific policy governing such pursuits was in place. Further, the court, in finding that the issue of the city's liability was a jury question, concluded that police officers engaging in hot pursuit is an operational function that is not immune from liability or subject to sovereign immunity if accomplished in a manner contrary to public reason and public safety.

### **Criminal Charges Against Law Enforcement Officers**

Under current law, an agency has the *option* under s. 111.065, F.S., to cover the costs of a criminal defense for a law enforcement officer, but these costs are payable from the agency's own funds. The State self-insurance fund cannot cover the cost of any criminal defense.<sup>18</sup>

The majority of employing agencies do not provide for the legal defense of an officer who is charged criminally. However, a law enforcement officer that has been charged criminally may request union representation, assuming the officer is a member and the union provides representation in a criminal action as part of its benefits. One law enforcement union does provide such representation to its members – which number at approximately 30,000 – as a membership benefit, if the alleged criminal conduct occurred in the line of duty.

### **Survey of Attorney's Fees and Costs Paid by Law Enforcement Agencies**

The Florida Legislative Committee on Intergovernmental Relations conducted a FAXNET Survey of law enforcement agencies regarding the number and costs of civil and criminal actions brought against full-time law enforcement officers employed in the fiscal year ending September 30, 2001. The surveys were sent to approximately 400 municipalities and 67 counties with the following results:

#### *1. Municipalities (115 responded-28 percent)*

- 83 reported no civil or criminal actions against full-time law enforcement officers for FY ending September 30, 2001.
- 30 municipalities responded that they had civil actions against full-time law enforcement officers for FY ending September 30, 2001.
- 2 municipalities responded that they also had criminal actions against full-time law enforcement officers for FY ending September 30, 2001 (City of St. Petersburg and the City of Daytona Beach).

Many municipalities with actions taken against their law enforcement officers were covered in full or by deductible insurance policies.

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<sup>17</sup> S. 604 So. 2d 1222 (Fla. 1992).

<sup>18</sup> Section 284.31, F.S., specifies the scope and types of coverage for the Insurance Risk Management Trust Fund and these do not include criminal charges.

2. *Counties (12 counties-18 percent)*

- 6 counties reported that they had no civil or criminal actions against full-time law enforcement officers for FY ending September 30, 2001.
- 5 counties responded that they had civil actions against full-time law enforcement officers for FY ending September 30, 2001.
- 1 county (Hillsborough) also had criminal actions against full-time law enforcement officers for FY ending September 30, 2001.

As was the case with municipalities, the majority of counties with actions taken against their law enforcement officers were covered in full or by deductible insurance policies.

**Calculation of Reasonable Attorney's Fees**

Lodestar provisions refer to the calculation of attorney's fees as has been defined by the Florida Supreme Court in a formula.<sup>19</sup> The formula is based on the number of hours reasonably expended multiplied by a reasonable hourly rate. In calculating the reasonable hourly rate, the court, in calculating attorney's fees, is to consider the following factors:

- The time and labor required, the novelty and difficulty of the question involved, and the skill necessary to perform the legal service properly.
- The likelihood that the acceptance of the particular employment will preclude other employment by the lawyer.
- The fee customarily charged in the locality for similar legal services.
- The amount involved and the results obtained.
- The time limitations imposed by the client or by the circumstances.
- The nature and length of the professional relationship with the client.
- The experience, reputation, and ability of the lawyer or lawyers performing the service.
- Whether the fee is fixed or contingent.<sup>20</sup>

**III. Effect of Proposed Changes:**

**Section 1** of the bill creates the "Law Enforcement Fair Defense Act" by revising s. 111.065, F.S., relating to employer payment of attorney's fees and costs in civil and criminal actions against law enforcement officers.

**Section 2** of the bill broadens the scope of "officer" to include law enforcement officer, correctional officer, and correctional probation officer as each are defined in s. 943.10, F.S. Subsection (2) of s. 111.065, F.S., is amended to change the prerequisites under which an employing agency may exercise the option to pay an officer's reasonable attorney's fees in a civil or criminal action to also include costs when the underlying basis for the action arose out of an officer's official duties.

Subsection (3) of s. 111.065, F.S., is created to require an employing agency to provide and pay for the legal defense of an officer in a criminal action if the employing agency determines that the officer's actions that gave rise to the charges:

<sup>19</sup> See Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145, (Fla. 1985).

<sup>20</sup> See *id.* at 1150.

- (a) Occurred in response to what the officer reasonably believed was an emergency; upon the need to protect the officer or others from imminent death or bodily harm; or during an officer's fresh pursuit, apprehension or attempted apprehension of a suspect whom the officer reasonably believed has perpetrated or attempted to perpetrate a forcible felony or escape;
- (b) Arose within the course and scope of the officer's duties; and
- (c) Were not acts of omission or commission which constituted a material departure from the employing agency's written policies and procedures, or from generally recognized criminal justice standards if no written policies or procedures exist.

Newly-created subsection (4) of s. 111.065, F.S., provides that when legal representation is requested under subsection (3) and the employing agency does not provide an attorney or the officer does not use the employing agency's attorney, the officer can select an attorney from a list provided by the employing agency or choose his or her own attorney.

An officer can request reimbursement for payment of his or her legal representation under this subsection if the officer's actions did not result in a plea of guilty or nolo contendere, or in a finding of guilt by a court or jury to any offense charged or any lesser or included offense that is substantially related to the offense charged. The reimbursement and determination of the reasonable attorney's fees and costs is provided as follows:

1. The officer has 30 days from the termination of the criminal case to submit an application for payment. The application shall include an itemization statement from an attorney or expert witness representing the officer, including the actual time expended and the rate at which fees and other expenses were computed. The officer is specifically prohibited from applying for the recovery of attorney's fees and costs incurred in an effort to collect the attorney's costs and fees provided for by the bill. The agency and the officer have 30 days thereafter to reach an agreement on the amount payable, or for payment to take place.
2. If the officer and the employing agency do not reach an agreement or payment is not provided within that 30 day period, the officer may submit his application for reimbursement to the court having jurisdiction over the criminal matter within 30 days of the failure to reach an agreement, failure to pay, or 30 days after the conclusion of the prosecution, whichever is later. The employing agency has the right to respond to the application for attorney's fees and costs. The court then is required to determine the entitlement to payment and the amount of reasonable attorney's fees and costs based on prevailing market rates, as well as other relevant factors, and whether the officer's actions complied with subsection (3). However, the amount of reasonable attorney's fees and costs to be awarded under this subsection may not exceed \$100,000. Also, the court is prohibited from applying a lodestar or fee multiplier provision to determine reasonable attorney's fees and costs under this subsection.

**Section 3** provides an effective date.

#### IV. Constitutional Issues:

##### A. Municipality/County Mandates Restrictions:

To the extent that political subdivisions including cities and counties (through the sheriff's department) are obligated to pay the legal costs and reasonable attorney's fees for certain civil and criminal actions brought against law enforcement officers, the bill could constitute a mandate as defined in Article VII, Section 18(a) of the Florida Constitution for which no funding source is provided to such political subdivisions:

No county or municipality shall be bound by any general law requiring such county or municipality to spend funds or to take an action requiring the expenditure of funds unless the Legislature has determined that such law fulfills an important state interest and unless: funds have been appropriated that have been estimated at the time of enactment to be sufficient to fund such expenditure; the Legislature authorizes or has authorized a county or municipality to enact a funding source not available for such county or municipality on February 1, 1989 ... and the law requiring such expenditure is approved by two-thirds of the membership of each house of the Legislature...

For purposes of legislative application of Article VII, Section 18 of the Florida Constitution, the term "insignificant" has been defined as a matter of legislative policy as an amount not greater than the average statewide population for the applicable fiscal year times ten cents. Based on the 2000 census, a bill that would have a statewide fiscal impact on counties and municipalities in aggregate or in excess of \$1,598,238 would be characterized as a mandate. While the terms of the bill limit the exposure of the employing agencies payment of attorney's fees and costs to no more than \$100,000 per action, 16 lawsuits involving \$100,000 in attorney's fees and costs per case, would reach the mandate threshold.

##### B. Public Records/Open Meetings Issues:

None.

##### C. Trust Funds Restrictions:

None.

##### D. Other Constitutional Issues:

This bill sets a \$100,000 cap on attorney's fees and costs. The issue of fee caps was recently addressed in a Florida Supreme Court case, *Olive v. Maas*.<sup>21</sup> At issue in *Olive* was the trial court's authority to grant fees in excess of the fee caps set forth in s. 27.711, F.S., relating to capital collateral cases, for a registry attorney who did not sign the

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<sup>21</sup> 811 So. 2d 644 (Fla. 2002).

services contract, contending that by agreeing to the statutory cap in the contract, the attorney would be waiving any other compensation to which he may be entitled. The court held that where extraordinary or unusual circumstances exist in a capital collateral case, the cap may be exceeded to ensure adequate representation.

The court reaffirmed its ruling and reasoning in *Makemson v. Martin County*,<sup>22</sup> and held that extraordinary circumstances may be used as a basis for exceeding the statutory fee cap. In *Makemson*, the case seemed to look to a statutory attorney's fee cap as a "legislative guide." The court stated that "it is within the inherent power of Florida's trial courts to allow, in extraordinary and unusual cases, departure from the statute's fee guidelines when necessary in order to ensure that an attorney who has served the public by defending the accused is not compensated in an amount which is confiscatory of his or her time, energy and talents. More precise delineation, we believe, is not necessary. Trial and appellate judges, well aware of the complexity of a given case and the attorney's effectiveness therein, know best those instances in which justice requires departure from statutory guidelines."<sup>23</sup>

## V. Economic Impact and Fiscal Note:

### A. Tax/Fee Issues:

None.

### B. Private Sector Impact:

Officers qualifying under the Act will be able to obtain legal representation and payment of attorney's fees and costs in specified actions providing the actions arose within the course and scope of employment and satisfy other criteria.

### C. Government Sector Impact:

All full-time officers, correctional officers, and correctional probation officers are now accorded the same potential benefit if the employing agency opts to pay for their legal fees and costs associated in their defense in certain civil or criminal cases. These same officers will benefit from the employing agency being required to provide and pay for legal representation in specified criminal actions.

The employing agency of the state, municipality, or any political subdivisions of a law enforcement officer will now incur the additional costs of providing and paying for the criminal defense of a broader category of law enforcement officers whose actions meet the criteria of the bill. Because the State Risk Management Trust Fund does not provide coverage for criminal actions, these attorney's fees and costs would have to be paid out of general revenue dollars.

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<sup>22</sup> 491 So. 2d 1109 (Fla. 1986).

<sup>23</sup> See *id.* at 1115.

Budgeting for attorney's fees and costs that may or may not be incurred during the next budget period may be difficult at best.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

- In current law, there is a statutory cross-reference in s. 633.175, F.S., (relating to the right to request release of information relating to an investigation of fraudulent insurance claims) to the definition of "law enforcement officer" as contained in s. 111.065, F.S. If there is an intent to incorporate the new amendments to s. 111.065(1), F.S., which redefine law enforcement officer, s. 633.175, F.S., will have to be re-enacted. Otherwise, the term as cross-referenced in s. 633.175, F.S., will be to the definition of "law enforcement officer" as it existed prior to the bill.
- Because the State Risk Management Trust Fund coverage does not provide for the defense of criminal claims, there is no mechanism for paying attorney's fees and costs for the criminal defense of law enforcement officers employed by the state out of the state self-insurance fund. Accordingly, in order to pay such attorney's fees and costs, a state agency employing officers, as defined in the bill, would likely need to obtain a specific appropriation from the Legislature.

**VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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